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Possible reform of investor-State dispute settlement (ISDS)

Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS

Note by the Secretariat

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I. Introduction

1. At its 35th session, the Working Group suggested that the Secretariat (i) prepare a list of the concerns about investor-State dispute settlement (ISDS) raised during its thirty-fourth and 35th sessions; (ii) set out a possible framework for its future deliberations; and (iii) consider the provision of further information to assist States with respect to the scope of some concerns (A/CN.9/935, para. 99).

2. Document A/CN.9/WG.III/WP.149 addresses items (i) and (ii) at an overview level. Documents A/CN.9/WG.III/WP.151 (this Note) and A/CN.9/WG.III/WP.152 address the requests of the Working Group on the topic of arbitrators and decision makers in ISDS.

3. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic.[1]

4. While this Note provides information to assist the Working Group in its consideration of certain concerns in ISDS and the desirability of reforms, it does not seek to express a view on the issues raised, which is a matter for the Working Group to consider.

II. Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS

A. Assessment of identified concerns

1. Overview of identified concerns

5. At its 35th session, the Working Group considered the question of arbitrators and decision makers in ISDS, including ethical requirements of which the main areas are independence and impartiality of arbitrators (A/CN.9/935, paras. 47–68 and 78–81), the impact of the appointment mechanisms (A/CN.9/935, paras. 54 and 69–77), and the qualifications and powers of arbitrators (A/CN.9/935, paras. 82–88).

6. In particular, the Working Group considered the causes of criticisms of the current ISDS regime as regards arbitrators, so as to assist in considering possible solutions in due course (A/CN.9/935, para. 55). In that context, the concerns raised included the following:

(i) The lack of precise definition of the relevant ethical requirements and of their scope in practice (A/CN.9/935, para. 56), as well as conflicts of interest, so-called double-hatting and/or issue conflicts resulting from the fact that arbitrators can also act as counsel in different ISDS proceedings (A/CN.9/935, paras. 78–81);

(ii) The appointment mechanisms and process, the impact of the role of arbitrators in ISDS cases (including the question of democratic accountability of arbitrators, A/CN.9/935, para. 58), whether more transparency would be needed in the appointment process, in particular where appointing authorities are involved (A/CN.9/935, paras. 76–77), and the impact of appointment mechanisms on diversity (A/CN.9/935, paras. 69–75);

(iii) The method of remuneration of arbitrators, which is often considered as a core element of independence, though the Working Group noted that less attention has been devoted to the question than other issues raised regarding arbitrators (A/CN.9/935, para. 57);

[1] See bibliographic references published by the Academic Forum, available under "Additional resources" at http://www.uncitral.org/uncitral/en/publications/online_resources_ISDS.html. The preparation of this Note also benefited from contributions by the following experts: Susan Franck, Jean Kalicki, Joost Pauwelyn, Sergio Puig and Maxi Scherer.

(iv) The qualifications required to adjudicate on ISDS cases and the powers and duties of arbitrators (A/CN.9/935, paras. 82–88); and

(v) The impact on independence and impartiality of the practice of third-party funding (A/CN.9/935, paras. 82–88).

7. This Note addresses the concerns considered by the Working Group regarding the efficacy of the existing legal framework in guaranteeing independence and impartiality of arbitrators, including disclosure requirements and challenge mechanisms. The appointment process and mechanisms and their impact and the question of arbitrators' qualifications and powers are addressed in document A/CN.9/WG.III/WP.152. A forthcoming Working Paper will address third-party funding.

8. At its 35th session, the Working Group suggested that information on other legal frameworks on independence and impartiality should be made available to the Working Group, including international commercial arbitration and international courts and tribunals (A/CN.9/935, para. 46). This Note includes information regarding these "comparators" and provides commentary on the relevance and reliability of information and data on individual issues, where appropriate.

2. Legal framework on independence and impartiality

(a) Requirements of independence and impartiality

(i) Notions of independence and impartiality[2]

9. Independence and impartiality of the adjudicator are key elements of any system of justice, meant to ensure fair trial and compliance with due process requirements. The Working Group emphasized that sufficient guarantees of independence and impartiality on the part of arbitrators is essential in ISDS (A/CN.9/935, para. 47).

10. A widely held view in the Working Group was that, in order to be considered effective, the ISDS framework should not only ensure actual impartiality and independence of arbitrators and decision makers, but also the appearance of those qualities. The view was expressed that efforts should therefore include both elements (A/CN.9/935, para. 53).

11. The most widespread conception of independence and impartiality is that they are distinct, but closely related, concepts. While independence usually relates to the lack of a business, financial, or personal relationship between an arbitrator and a party to the arbitration, impartiality means the absence of bias or predisposition of the arbitrator or decision maker towards a party. Lack of independence usually derives from problematic relations between an arbitrator and a party or its counsel and lack of impartiality would arise, for instance, if an arbitrator appears to have pre-judged some matters.

[2] The Working Group may wish to note that the focus of this Note, as in the discussions in the Working Group, is on the independence and impartiality of arbitrators. However, other requirements upon arbitrators — including neutrality, fairness to the parties, diligence and confidentiality can be found in national legislation and arbitration rules. In substance, these rules require the arbitrator to: (i) perform his or her duties with fairness and diligence, thoroughly and expeditiously during the course of the proceeding; and (ii) keep non-public information confidential, and not use any information to gain a personal advantage, or to affect the interest of others. Examples are Rule 6 of the ICSID Convention and article 17 of the UNCITRAL Arbitration Rules.

12. The requirements of independence and impartiality apply to any judicial or judicial-like dispute settlement process.[3]

13. The process to appoint arbitrators and decision makers has the potential to create relationships between the appointing party and the arbitrator and decision maker. The context and impact of the appointment process in various arbitral and judicial systems are discussed in A/CN.9/WG.III/WP152.

14. When considering the notion of independence, a distinction is usually made between individual independence, meaning the absence of connection between a party and the decision maker, sometimes also called functional independence (as it relates to the function of the decision maker); and institutional independence, meaning the absence of external influence on a dispute settlement body.

15. Arbitrators commonly engage in other professional activities, which can give rise to connections with the disputing parties and the dispute and may have a bearing on individual independence, which is the main area of focus in the ad hoc ISDS context.[4] Nonetheless, institutional independence is still relevant. In institutional arbitration, for example, the institutional set-up must guarantee structural independence (that is, that the institutions do not intervene in the adjudication of the dispute). While arbitral institutions in ad hoc systems generally rely primarily on the individual independence of the adjudicators from the disputing parties and the subject-matter of the dispute, the same principle of institutional independence applies.

[3] The requirements apply to domestic courts, to international commercial arbitration, to investment arbitration, to inter-State arbitration, and to the international judiciary. They reflect fundamental principles, see e.g. Universal Declaration of Human Rights, 10 December 1948, United Nations Doc. A/810 at 71 (1948), Art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"), International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art. 14(1) ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]"), ECHR, Art. 6(1) ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"), the statutes of various international judicial bodies reflect requirements of independence and impartiality, see Bangalore Principles of Judicial Conduct (2002), available at http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf. The standards are included in judges' oaths of office; the ITLOS Statute, which sets out the oath in the following terms: "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously." Also, the United Nations Basic Principles on the Independence of the Judiciary and the "Burgh House Principles on the Independence of the International Judiciary", which are non-binding principles designed to apply primarily to standing international court, set out general guidelines on independence and impartiality as follows: "To ensure the independence of the judiciary, judges must enjoy independence from the parties to cases before them, their own states of nationality or residence, the host countries in which they serve, and the international organizations under the auspices of which the court or tribunal is established. Judges must be free from undue influence from any source. Judges shall decide cases impartially, on the basis of the facts of the case and the applicable law. Judges shall avoid any conflict of interest, as well as being placed in a situation which might reasonably be perceived as giving rise to any conflict of interests, and Judges shall refrain from impropriety in their judicial and related activities." (Available at https://www.ucl.ac.uk/international-courts/sites/international-courts/files/burgh_final_21204.pdf.)

[4] By contrast, the statutes of international courts and tribunals proceed on an assumption, for the most part, that the judges are engaged on a full-time basis. Consequently, their approach to non-judicial activity and relationships is grounded in circumstances that are different from ISDS

(iii) Existing standards

16. In the field of ISDS, the ICSID and UNCITRAL Rules,[5] as well as institutional rules of other relevant bodies,[6] focus on (i) setting out the principle that arbitrators shall be independent and impartial; (ii) providing rules for the prevention of dependence and bias by requiring arbitrators to make certain disclosures regarding issues that might raise questions about their independence or impartiality; and (iii) defining procedures for parties to challenge arbitrators based on real or apparent lack of independence or impartiality, which are the focus of this section.

17. The Working Group may wish to note that independence and impartiality under the arbitration rules mentioned above are defined as duties for arbitrators who are required to make decisions free of external interferences and bias. Independence is also an entitlement of an arbitrator, as no entity or person may interfere with, or influence, an arbitrator.

18. Soft law standards have been developed to complement applicable rules. For instance, the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines") set out a general principle of independence and impartiality.[7] They also provide that each potential arbitrator is responsible for assessing potential conflicts of interest or possible bias and for disclosing those matters.[8]

19. Some recently concluded investment treaties contain a code of conduct for arbitrators acting in investor-State dispute settlement arising under that treaty, thereby complementing the provisions of the applicable arbitration rules.[9] Those codes usually address the standards of conduct for arbitrators (and other persons), their duties in the conduct of the arbitration, the disclosure obligations and the obligations of confidentiality. They usually do not provide for sanctions, other than the right of both parties to demand replacement of the arbitrator.

20. The Dispute Settlement Understanding of the World Trade Organization (WTO DSU) and WTO Rules of Conduct require WTO DSU members (among other relevant persons) to be "independent and impartial, shall avoid direct or indirect conflicts of interest …, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved."[10]

(iii) Additional Specific issues or concerns

21. Certain issues have been identified in the context of ISDS as at particular risk of raising a lack of independence and impartiality or as raising concerns thereof.

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[5] Article 14 (1) of the ICSID Convention, Rule 6(2) ICSID Arbitration Rules, Article 11 Of the UNCITRAL Arbitration Rules. The difference in the wording of the requirements for independence and impartiality in the above arbitral rules is also considered not to indicate differing standards. There is general agreement that the rules encompass both independence and impartiality requirements (for example, the ability to exercise independent judgment can be seen as an alternative way of phrasing impartiality).

[6] See also the Permanent Court of Arbitration, Arbitration Rules 11–13, The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in force as of 1 January 2017, Article 15, the Rules of Arbitration of the International Chamber of Commerce, in force as from 1 March 2017, article 11, Cairo Regional Centre for International Commercial Arbitration, Arbitration Rules in force as from 1 March 2011, article 11

[7] They provide that "every arbitrator shall be impartial and independent at the time of appointment and shall remain so until the final award has been rendered or the proceedings have otherwise terminated". The IBA Guidelines are available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

[8] See Guideline 7 d, available as above

[9] See, for instance the European Union-Singapore Free Trade Agreement (Annex 15-B, Code of Conduct for Arbitrators and Mediators, version as of May 2015), and Canada-European Union Comprehensive Economic Trade Agreement (CETA) (Annex 29-B, Code of Conduct for Arbitrators and Mediators)

[10] "Rules of conduct for the understanding on rules and procedures governing the settlement of disputes", 1996, available at https://www.wto.org/English/tratop_e/dispu_e/rc_e.htm

These include repeat appointments, and situations of conflicts of interest and/or so-called issue conflicts.

Repeat appointments

22. The question of repeat appointments was considered by the Working Group at its 35th session. It was said that some arbitrators are commonly characterized as pro-State or pro-investor, based on this proxy of repeat appointments by one or other party (A/CN.9/935, para. 54). Another aspect of repeat appointments arises where the same arbitrator is appointed in similar circumstances (e.g. by different States but in disputes raising similar legal issues). It is however difficult to determine the impact of repeat appointments in fact on independence and bias on the part of the arbitrator, and whether they in fact reflect ideology or policy preferences, particularly as regards any impact on outcomes.

23. In one ICSID case, repeat appointments of themselves were not considered to indicate lack of independence, even when similar legal and factual issues arose.[11] The decision in another case, however, held that "multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge".[12] The economic significance of the appointments to the arbitrators concerned and whether they indicate arbitrator dependence on the party, whether the repeat appointments are such that a prior relationship arises, and whether overlapping issues of law and fact are raised are also to be taken into consideration.

24. The IBA Guidelines include repeat appointments by parties and counsel on its "Orange List".[13] The Guidelines suggest that justifiable doubts do not arise unless "[t]he arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties" or "[t]he arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm". However, the Guidelines provide an exception to these parameters for repeat appointments in specialized fields of arbitration where it is the practice for parties to repeatedly appoint the same arbitrator in different cases.[14]

Double-hatting or role confusion

25. One issue that has been the subject of significant controversy when it comes to the question of independence and impartiality of arbitrators is the switching of roles between individuals acting as arbitrator, counsel and expert in different ISDS proceedings, with the possibility of ensuing conflicts of interest and/or so-called issue

[11] ICSID cases Tidewater Inc. and others v. Bolivarian Republic of Venezuela, ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, December 23, 2010.

[12] Opic Karimum Corporation v. Bolivarian Republic of Venezuela, Decision on the Proposal to Disqualify Professor Philippe Sands, ICSID Case No. ARB/10/14 (May 5, 2011).

[13] The Guidelines set out four categories of Application Lists that categorise potential conflicts that must be disclosed, of which the first is the "Red List". The Red List has two sub-categories: first, the Non-Waivable Red List, which sets out the most serious conflicts and, as the title of the sub-category indicates, cannot be cured by a waiver from the parties. Secondly, the Waivable Red List, containing situations that give rise to justifiable doubts as to an arbitrator's independence and impartiality, but which can be waived by parties (with the caveats that the waiver is express and is based on relevant knowledge). The "Orange List" provides a non-exhaustive list of situations that are generally not subject to disclosure, but an arbitrator must assess on a case-by-case basis whether a given situation (whether or not specifically listed under the Orange List) can nevertheless give rise to justifiable doubts as to his or her impartiality. Finally, the "Green List" sets out situations where no conflict of interest is considered to exist (whether actual or perceived), and thus there is no requirement for disclosure in those situations.

[14] On the other hand, in international commercial arbitration, the economic importance of the appointments to the arbitrator, rather than the number of appointments over a certain time-period, has been taken as an indicator. See, for example, LCIA Reference No. 81160 (August 28, 2009).

conflicts.[15] These situations raise concerns in that arbitrators have the possibility of deciding on, or appearing to decide on, an issue in one manner so as to benefit a party that they represent in another dispute. Further, a counsel may agree to appoint a particular arbitrator in one case, and this arbitrator, when acting as counsel in another case, agrees to appoint the appointing counsel as arbitrator in that second case.

26. At the 35th session of the Working Group, there was general agreement that this practice, often termed "double-hatting" or "role confusion", raised a concern to the extent that it created a potential or actual conflict of interest. The Working Group heard at that session that such conflicts, or even the suspicion that cases are decided as a result of these influences, have a negative impact on the perception of the legitimacy of ISDS (A/CN.9/935, paras. 78 and 81). The concerns about double-hatting had been stated to be particularly acute in ISDS in that the interpretation and application of the same or similar legal instruments are regularly at issue.

27. On the other hand, arguments raised in the Working Group in favour of permitting the practice include that the relatively small pool of ISDS arbitrators is such that prohibiting double-hatting would undermine the quality and rigour of the decision makers in the current system.[16] Another is that, as the Working Group heard at the 35th session, counsel seeking to become full-time arbitrators cannot for economic reasons cease their practice as counsel while there is no guarantee of arbitral appointments, and that service as counsel can allow for the would-be arbitrators to gain the experience and reputation necessary for arbitral appointments to follow (A/CN.9/935, para. 81).

28. While noting that States had attempted to address the question in more recent investment treaties as the 35th session, the Working Group requested additional information on the extent of the practice, so as to delineate the scope of the issue and understand its nature (A/CN.9/935, para. 81).

29. Domestic legislation in general does not ban the practice of double-hatting and nor do the rules of ICSID and UNCITRAL prohibit it. The matter is also not addressed in the IBA Guidelines. Consequently, whether double-hatting raises conflicts of interest in practice is assessed in challenges to arbitrators by reference to the general standard in challenges: are there justifiable doubts, or another applicable test, as to whether it indicates a lack of independence and impartiality on the facts of the case concerned?

30. In addition, very few, if any, standards on ethics directly discuss the permissibility or otherwise of multiple roles of this type. There are, however, some indirect references within certain codes that can be read to allow or limit multi-roles in various international courts and organizations.[17]

31. In the context of international courts and tribunals, Burgh House principle 8.1 states that "[j]udges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may reasonably appear to affect their independence or impartiality".[18] Article 16 of the Statute of the International Court of

[15] An illustration of role confusion are the interlinkages in the cases of Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12 (Disqualification decision is not publicly available), Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, (Disqualification decision is not publicly available), and Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19.

[16] It has been suggested, however, that the pool has expanded since these arguments were first raised. See, further, the Pluricourts Study discussed in paras. 32 et seq. below.

[17] See for instance, Section 18 of the CAS Code on Arbitration which provides: "The personalities who appear on the list of arbitrators may be called upon to serve on Panels constituted by either of the CAS Divisions." Upon their appointment, the CAS arbitrators and mediators sign a declaration undertaking to exercise their functions personally with total objectivity and independence, and in conformity with the provisions of this Code. CAS arbitrators and mediators may not act as counsel for a party before the CAS.

[18] For information on the Burgh House Principles, see footnote 3 above.

Justice (ICJ) bans members of the Court from obtaining and acting in certain roles. [19] The ICC Statute provides that "[j]udges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence,"[20] and, indeed, and that "[j]udges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature." Judges of the ECHR, similarly, "shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office".[21]

32. The World Trade Organization (WTO) has a provision that takes a rather different approach from that in the statutes and codes of other international tribunals and organizations. In Article 8 of the WTO Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU), there is a preference for a potential panellist who has previously acted as counsel in front of a WTO Panel.[22] This is the most explicit example of allowing and even encouraging some sort of multi-roles. However, the language of the statute itself does not clarify whether or not the panellist may subsequently continue to practice as counsel in front of WTO Panels.

33. In one well-reported challenge decision based on double-hatting in ISDS, an appearance of bias or conflict in the context of double-hatting was deemed sufficient to merit disqualification.[23] The case was resolved in fact through the resignation of the individual concerned as counsel in one of the cases at issue, and it does not therefore provide guidance on the extent of conflict that would lead to disqualification.

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[19] Statute of the International Court of Justice art. 16.1, June 26, 1945, 59 Stat. 1055 (proclaiming that "[n]o member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature. 2. Any doubt on this point shall be settled by the decision of the Court"). The ICJ has addressed double-hatting in two Practice Directions issued in 2002. Practice Direction VII: "The Court considers that it is not in the interest of the sound administration of justice that a person sits as judge ad hoc in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court. Accordingly, parties, when choosing a judge ad hoc pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge ad hoc in another case before the Court", and Practice Direction VIII: "The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge ad hoc, Registrar, Deputy-Registrar or higher official of the Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge ad hoc, Registrar, Deputy-Registrar [etc.] ..." The impact of these Practice Directions has not been to prevent ICJ judges entirely from acting as arbitrators in ISDS. A study found that seven of the ICJ's 15 members, as at 2017, have worked as arbitrators during their tenure, in at least 90 cases, that three of those judges each worked as arbitrators in nine cases, and the remaining four judges were identified as arbitrators in only one or two cases each, and that several current judges also worked on annulment committees. Finally, the study found that sitting ICJ judges have sat or are sitting as arbitrators in nearly 10 per cent of the 817 known investment treaty cases (see http://www.tni.org/media/sitting-international-court-justice-judges-worked-arbitrators-least-90-investor-state-cases).

[20] Article 40(2).

[21] Rule 4, Rules of Court of the European Court of Human Rights (2018), available at https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

[22] UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, Art. 8 (WORLD TRADE ORG.) ("Members shall undertake, as a general rule, to permit their officials to serve as panellists"). Art. 8 provides "Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement ...")

[23] Telekom Malaysia Berhad v. The Republic of Ghana, PCA Case No. 2003-03.

34. In a 2017 study, based on 1,039 cases in the databases of Pluricourts and ICSID,[24] the relationships between 3,910 individuals were analysed. The findings on double-hatting can be summarized as follows. First, that the practice of double-hatting is prevalent among a small but highly-influential group of arbitrators (25 individuals, and particularly so for a sub-group of 5 individuals within that group), but it is not widespread across the entire spectrum of ISDS cases (and not as widespread as may be perceived). Secondly, double-hatting for the "top 25" individuals has been relatively stable since 2005, though for other individuals, it rose sharply in 2014 but has since declined. Third, that those that have ceased double-hatting in the last four years appear to have done so as they reach retirement age. Other reasons posited for post-2014 reductions include having a sufficiently large caseload as arbitrator to preclude serving as counsel, or being appointed as a judge to the ICJ. Consequently, it is suggested that criticism of the practice was not a motivating factor in recent reductions, and the recent reductions may not provide reliable indicators for the future. A fourth finding is that some prominent arbitrators have expressly declared that they will not engage in the practice. The data used for the 2017 study also indicated that the potential pool of investment arbitrators has expanded considerably since the 1990s. There appears to be no comparable publicly-available study on the scope and extent of the "revolving door" (sequential appointments as arbitrator and counsel) or other issue conflicts.

Pre-judgment of issues

35. Another type of issue conflict can arise where an arbitrator is said to have "pre-judged" issues based on their prior awards or decisions, publications and statements indicating their views on particular legal issues or on ISDS as a regime. A study by the International Council for Commercial Arbitration (ICCA) and others, involving consultation with arbitrators, counsel, members of arbitral institutions, and academics, among others, highlighted a distinction between views about legal and factual issues.[25] The Report found that prior decisions on legal matters alone were unlikely to lead to disqualification (consistent with the approach under the IBA Guidelines). On the other hand, views about factual matters — particular those arising in the instant dispute — have been found to be of concern. However, the degree of engagement considered to raise concern in relation to facts at issue arising outside the instant dispute has varied in ICSID challenge decisions.[26]

36. Tribunals have also held that prior interpretation of a legal clause at issue in a pending case alone need not indicate a lack of impartiality, as it is not related to the merits of the case, and that presentation of a particular argument as counsel was not sufficient to prevent an arbitrator considering the question impartially. Similar

[24] The PluriCourts Investment Treaty Arbitration Database (PITAD) as of 1 January 2017 and ICSID annulment proceedings respectively. See Malcolm Langford, Daniel Behn, Runar Hilleren Lie, The Revolving Door in International Investment Arbitration, Journal of International Economic Law, Volume 20, Issue 2, 1 June 2017, Pages 301–332, https://doi.org/10.1093/jnel/jgx018. The study found that of the 2,699 lawyers that represent claimants and respondents, only 1 per cent (the top 25) have participated in more than 13 cases.

[25] See Report of the Joint Task Force on Issue Conflicts in Investor-State Arbitration established in November 2013 between ICCA and the American Society of International Law's Howard M. Holtzmann Center, available at http://www.arbitration-icca.org/publications/ASIL-ICCA_Report.html.

[26] Caratube v. Kazakhstan (ICSID Case No. ARB13/13), cf Içkale v. Turkmenistan (ICSID Case No. ARB/10/24).

findings were made regarding published academic opinions, which were not considered as evidence of pre-judgment.[27]

37. The IBA Guidelines include prior legal opinions in the Green List,[28] as examples of "specific situations where no appearance and no actual conflict of interest exists from an objective point of view" and which the "arbitrator has no duty to disclose."

38. An ICSID tribunal has stated that unless the opinions expressed are "specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the [p]arties in [the] proceeding," there is no lack of independence and impartiality.[29]

39. The following prior opinions or decisions have been held insufficient in ICSID to indicate a relevant bias: a prior decision or procedural ruling against a party; a prior dismissal of a party's application for reconsideration; expressed views on legal issues not raised in the pending case; a difference of opinion between the tribunal members on an interpretation of fact or law; that an arbitrator's prior decision is subject to an annulment application.[30]

(iv) Other issues or concerns

40. At the 35th session, the Working Group heard that parties or their counsel might appoint arbitrators in ISDS that would support their positions in the case (A/CN.9/935, para. 56), and that the issues of party remuneration, dissenting opinions and repeat appointments of certain arbitrators could indicate arbitrator bias. It has also been said that informal controls, such as pressure from within the population of arbitrators and an arbitrator's interest in maintaining his or her reputation as a fair-minded decision maker, may mitigate those issues. In addition, it was also that the appointment of a presiding arbitrator could ensure a certain level of neutrality, independence and impartiality in the tribunal, but that polarization in tribunals so that the ultimate responsibility for deciding the case rested with the presiding arbitrator could compromise the notion of a three-member tribunal, seeking a unanimous decision (A/CN.9/935, paras. 54 and 60).

41. The party remuneration of arbitrators was considered to be a cause of perceptions that co-arbitrators might support their appointing party,[31] or might provide an economic incentive for them to interpret jurisdiction broadly, which would

[27] See, for example, ICSID cases Tidewater Inc. and others v. Bolivarian Republic of Venezuela, ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, December 23, 2010, Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela, ARB/10/9, Decision on Claimant's Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Tawil, Arbitrators, May 20, 2011, Saint Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13, Decision, 54–56 (Feb. 27, 2013), Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina, Participaciones Inversiones Portuarias (PIP) SARL v. Gabon ICSID Case No. ARB/08/17, Decision, (Nov. 12, 2009).

[28] For a summary of the various Application Lists under the IBA Guidelines, see footnote 13 supra.

[29] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26.

[30] In addition to the cases in footnotes 26 and 29 above, see Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Challenge to Arbitrator (Dec. 8, 2009), Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision (Dec. 21, 2011) Repsol, S.A. & Repsol Butano S.A. v. Republica Argentina, ICSID Case No. ARB/12/38, Decision Sobre la Propuesta de Recusacion a la Mayoria del Tribunal, ConocoPhillips Company and others v. Bolivarian Republic of Venezuela, ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, February 27, 2012.

[31] Under the default rules of the main arbitral institutions, fees for the co-arbitrator are typically payable by the disputing parties, and those of the presiding arbitrator are shared equally between them.

increase the market for future cases.[32] On the other hand, it has been said that the relative impact of this economic incentive may be sufficiently low that the issue is not significant. Studies have not identified a causal link between these matters and studies of national courts and international courts indicate that judges may err on the generous side in issues of jurisdiction.

42. The Working Group also heard at its 35th session that dissenting opinions were overwhelmingly issued by the arbitrators appointed by the losing party, which contributed to the overall perception of possible bias (A/CN.9/935, para. 58). Possible explanations from commentators include that arbitrators feel themselves under a duty to their appointing parties or counsel or, conversely, that the arbitrators are not randomly-selected and therefore the level of dissents is not itself indicative of bias. In addition, there does not appear to be consensus on what the "correct" level of dissenting opinion might be, and whether the existence or level of dissenting opinions can indicate bias. It has also been said that ISCID statistics indicate that issuing a dissenting opinion reduces the chances of reappointment as a presiding arbitrator. In addition, the majority of ISDS cases are decided unanimously, indicating that in that majority of cases, either the investor-appointed arbitrator is agreeing to reject the investor's claims or the State-appointed arbitrator is agreeing to find against the State.

(b) Addressing a potential lack of independence and impartiality: the duty for arbitrators to disclose

43. The primary regulatory mechanism designed to ensure independence and impartiality of arbitrators is the requirement that they disclose all interests or other relationships that may be "problematic", i.e. raise potential conflicts of interest. Under both the ICSID Rules and the UNCITRAL Rules, arbitrators are required to disclose any circumstance that might cause doubts regarding the independence and impartiality of the arbitrator.[33] This includes signing a declaration disclosing any past or present relationships with the parties and any other circumstances that might cause a party to question the arbitrator's reliability for independent judgment at the time of appointment.[34] The disclosure obligation is then continuing, including the prompt disclosure of any relevant circumstances that arise after appointment.

44. The legal framework also includes soft law instruments, such as the IBA Guidelines. These Guidelines provide more detailed disclosure requirements, in that they set out quantitative, objective, and fact-based categories of information. These example-based guidelines can help delineate whether relationships are problematic in individual cases. However, they do not address all areas relevant for ISDS, notably relationships between the arbitrators on the one hand and counsel and the parties on the other.

45. Arbitral institutions have also recently sought to complement the existing legal framework by providing soft law guidance. One example is the ICC "Guidance Note for the disclosure of conflicts by arbitrators" in 2016, designed to ensure "that arbitrators are forthcoming and transparent in their disclosure of potential conflicts".[35] The ICC explains that this Note relies on the "fundamental principle that parties to an

[32] See Gaukrodger, D. (2017), "Adjudicator Compensation Systems and Investor-State Dispute Settlement", OECD Working Papers on International Investment, No. 2017/05, OECD Publishing, Paris, https://doi.org/10.1787/e2890bd5-en.

[33] See Rule 6(2), ICSID Rules; Article 13(2), ISCID Additional Facility Rules; Article 11, UNCITRAL Rules. It may be noted that the current process of revision of the ICSID Rules address the matter, under the proposed revision, the disclosure requirements have been increased in the declarations and with respect to third-party funding. This will help to avoid conflicts of interest in the selection process and will give parties better information as to whether an application for disqualification is warranted. (See "Proposals for amendment of ICSID rules — Synopsis, at para. 34, available at https://icsid.worldbank.org/en/Documents/Amendments/Vol.One.pdf.)

[34] See Rule 6(2), ICSID Rules; see Annex, UNCITRAL Arbitration Rules.

[35] See https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/. For further explanation from the ICC, see https://iccwbo.org/media-wall/news-speeches/icc-court-adopts-guidance-note-on-conflict-disclosures-by-arbitrators/.

arbitration have a legitimate interest in being fully informed of all facts or circumstances that may be relevant in their view in order to be satisfied that a prospective arbitrator or arbitrator is and remains independent and impartial or, if they so wish, to explore the matter further and/or take the possible courses of action contemplated by the ICC Rules".[36]

46. In the context of international courts and tribunals, the International Court of Justice provides that if a member of the Court considers that "for some special reasons" he should not take part in the decision of a particular case, he should inform the President accordingly.[37] The Burgh House Principles require judges to "disclose to the court and, as appropriate, to the parties to the proceedings any circumstances which come to their notice at any time by virtue of which any of Principles 7 to 13 apply". The Principles also require courts to establish "appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relation to any particular case". They also allow a waiver mechanism similar to that in the IBA Guidelines: "judges shall not be prevented from sitting in a case where they have made appropriate disclosure of any facts bringing any of those Principles into operation, and where the court expresses no objections and the parties give their express and informed consent to the judge acting" (Principle 15).[38]

47. Under the WTO DSU, members of the appeals board (among other relevant persons) are to be "independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved."[39] The application is different from the situation in ISDS: the WTO Working Procedures for Appellate Review, which apply to the WTO appeals procedure, limit the disclosure requirement for the judges concerned by providing that issues of insignificant relevance need not be disclosed, and the privacy of judges is also to be respected.[40]

48. At the international level, the extent of a duty upon arbitrators to investigate potential conflicts of interest is unclear. Some tribunals have found that arbitrators can be deemed impartial if they do not have knowledge about a certain conflict and that arbitrators do not have a duty to investigate, but others have required arbitrators to investigate potential conflicts of interest. The IBA Guidelines provide that "(f)ailure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries."[41] However, what may be considered to comprise "reasonable enquiries" is considered to depend on circumstances.

(c) Contours of the challenge mechanism

49. A further critical safeguard to ensure independence and impartiality on the part of arbitrators comprises standards and procedures for parties to challenge arbitrators based on a real or apparent lack of independence or impartiality. An effective challenge mechanism must fulfil two functions. Its first function is to provide the teeth of the requirements for independence and impartiality and so to the public interest in fair procedures: that is, it must allow for partisan arbitrators to be disqualified. Secondly, it must be sufficiently robust to allow for cases to proceed.

50. The usual consequence of a finding of non-compliance with ethical standards after the appointment of an arbitrator is the removal and replacement of the arbitrator

[36] Ibid.
[37] ICJ Statute, Article 24 (1).
[38] For information on the Burgh House Principles, see footnote 3 above.
[39] "Rules of conduct for the understanding on rules and procedures governing the settlement of disputes", 1996, available at https://www.wto.org/English/tratop_e/dispu_e/rc_e.htm.
[40] Rule VI. This rule weighs the importance of disclosure is against competing factors, but under the rules any doubt is to be resolved in favour of disclosure.
[41] General Standard 7(d).

(ii) What are the standard of proof and threshold for disqualification?

56. Under article 57 of the ICSID Convention, a challenging party must demonstrate a "manifest lack" of (among other things) "[r]eliability to exercise independent judgment".[45] As noted above, the UNCITRAL Model Law refers to the existence of circumstances "that give rise to justifiable doubts as to [an arbitrator's] impartiality or independence" (Article 12(2)).

57. It is generally agreed that proof of actual dependence or bias is not required. Rather, "it is sufficient to establish the appearance of dependence or bias."[47] The appearance should be obvious or evident (that is, not speculative or based on inference or mere belief); it has been said it should be apparent to the court without the assistance of counsel; it must be grounded in facts, and that the standard "imposes a relatively heavy burden of proof" on the challenging party. Moreover, according one decision on challenge by the Appointing Authority in the Iran-United States Claims Tribunal, "the challenged person should be given the benefit of the doubt as to the truth of what is alleged in support of the challenge".[48]

58. The precise meaning of "manifest lack" has varied across cases. While neither article 14 or 57 of ICSID Convention refers to a test of "reasonable doubts" or a third-party objective observer, some ICSID decisions indicate that "reasonable doubts" — the UNCITRAL standard — are sufficient.[49] Consequently, it has been said that if "a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case," an inference of manifest bias can be made. Other decisions indicate that "manifest" involves a higher standard, so that the conflict is evident or apparent.[50]

59. As a general matter, data indicate that proportionately very few challenges are successful, whether measured against overall caseload or challenge applications,[51] though as arbitrators may resign when challenged, these figures may not provide a true picture of the efficacy of the mechanism. The Working Group may also wish to note that the limited published decisions emphasize their fact-specific nature, so that they provide examples of situations in which impartiality and independence are lacking, rather than providing comprehensive guidance on the application of the standards in practice.

60. A common ground for launching a challenge arises if the arbitrator and appointing party or counsel had a prior or have a continuing personal or professional

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[45] For a listing of ICSID disqualification decisions, see https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Disqualification.aspx.

[47] Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr Bruno Boesch, (Mar. 20, 2014), available at http://italaw.com/sites/default/files/case-documents/italaw3133.pdf, at para. 57. This reasoning was also followed by the ICSID Chairman in two earlier decisions: Blue Bank v. Venezuela (Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, paras. 22–26 (Nov. 12, 2013)) and Burlington v. Ecuador (Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (Dec. 13, 2013), available at http://italaw.com/sites/default/files/case-documents/italaw3028.pdf).

[48] Challenge request of Mr. Assadollah Noori, member of the Chamber one, in case No. 248, 24- Iran-United States Claims Tribunal at 309-324 (March 2, 1990).

[49] Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, (Oct. 3, 2001); SGS Societe Generale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13.

[50] That is, the conflict is "self-evident, clear, plain on its face or even certain, rather than the product of elaborate interpretations one way or another or susceptible of argument one way or another or being necessary to engage in elaborate analyses". Electrabel S.A. v. Republic of Hungary (Electrabel), ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal (Feb. 25, 2008).

[51] Approximately 3 per cent of challenge applications in ICSID, and 22 per cent in commercial arbitrations at the London Court of Arbitration (both percentages based on published decisions). See, also, the PCA submission in A/CN.9/WG.III/WP.146, para. 60.

relationship outside the instant appointment which may compromise the arbitrator's ability to decide the case on an independent and impartial basis. Such so-called "problematic" relationships are assessed by reference to such matters as the proximity, duration and financial impact of the relationship, and whether it is historical or ongoing.

61. ICSID cases have found the following relationships did compromise independence and impartiality: where an overseas branch of the arbitrator's law firm was acting against the respondent in another arbitration and the challenged arbitrator derived remuneration from the different branches of the firm; where the arbitrator was also appointed as arbitrator in a related case raising overlapping issues of law and fact, and the arbitrator could not be expected to maintain objectivity and open-mindedness;[52] where the counsel and arbitrator are from the same chambers, following a change in the composition of the respondent's team to include the barrister as counsel, after the proceedings had begun.[53]

(iii) *Challenge decisions in international arbitration, national systems and international courts and tribunals*

62. In the broader international arbitration context, other relationships that have been found to raise "justifiable doubts" about independence and impartiality include: multiple appointments where the arbitrator does not maintain diversified sources of appointments; and prior relationships between parties and the arbitrator's law firm (one providing unrelated legal advice in the past, the other advice on the contract that was the subject of the arbitration). A material question is the extent to which the arbitrator is financially dependent on the entity or person with which he or she has a relationship. If the arbitrator has a significant financial interest in the outcome of the case, or if multiple appointments indicate financial dependence on a party or counsel, he or she is vulnerable to disqualification.

63. At the national level, some courts have held that a board member may not act as an arbitrator in cases involving the company concerned, but the English Court of Appeal has stated that there is no risk of bias in such a situation.[54]

64. The "Application Lists" in the IBA Guidelines do not include any relationships outside the instant arbitration as Waivable or non-Waivable Red List cases.[55] Such relationships fall within "specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence" (that is, within the Orange list).[56] These include prior legal advice given to, or previously acting as counsel for, one of the parties; more than two previous appointments within three years; more than three appointments ongoing but unrelated legal advice from the arbitrator's law firm; membership of the same barrister's chambers as another co-arbitrator or counsel; acting as co-counsel, and other issues indicating financial dependence.

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[52] Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr Bruno Boesch, (Mar. 20, 2014)

[53] Hrvatska Elektroprivreda, d.d. v. Slovenia, ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel, para. 34 (May 6, 2008). By contrast, ICSID cases have found the following relationships did not result in a lack of independence or impartiality: A non-executive directorship of a company that was a minority shareholder of the parties; Where a member of an arbitrator's law firm had advised the claimant on a transaction unrelated to the arbitration (but had not given strategic or general legal advice); Where the arbitrator had given tax advice to the principal shareholder in the claimant corporation and had a profit-sharing arrangement with the lawyers acting for the claimant before his appointment, but no longer held these positions; Where an arbitrator was formerly co-counsel with the appointing counsel; A transitory and long-ago schooling acquaintance between an arbitrator and counsel to a party; and Occasional social contacts between the claimant and its party-nominated arbitrator.

[54] W Limited v. M Sdn Bhd [2016] EWHC 422 (Comm)

[55] For a summary of the various Application Lists under the IBA Guidelines, see footnote 13 supra

[56] Ibid

65. Despite their increasing acceptance, the Working Group may also wish to note that the IBA Guidelines are not always accepted as setting the relevant standard.[57] For example, in a United Kingdom of Great Britain and Northern Ireland case, a sole arbitrator in an international commercial arbitration case was a partner in a law firm that, during the course of the arbitration in question, provided substantial legal services to, and derived substantial remuneration from, an affiliated company of the defendant. The judge ruled that there was no apparent bias, although he accepted that the conflict clearly fell within paragraph 1.4 of the non-Waivable Red List.[58] In holding that a "fair minded and informed observer" (the relevant standard in English law) would not conclude that there was a real possibility that the arbitrator was biased, the judge stated that paragraph 1.4 inappropriately failed to take account of "whether the particular facts could realistically have any effect on impartiality or independence", and in particular in the instant case where the relationship was not known to the arbitrator."[59]

66. The International Residual Mechanism for Criminal Tribunals has a case database, which includes disqualification applications.[60] The cases set a high bar for disqualification; decisions include that "there is a presumption of impartiality that attaches to a Judge or a Tribunal and, consequently, partiality must be established on the basis of adequate and reliable evidence;" in the absence of evidence to the contrary, it must be assumed that the judges of the International Tribunal "can disabuse their minds of any irrelevant personal beliefs or predispositions."[61]

67. Published information indicates that the Iran-United States Claims Tribunal has witnessed five challenge procedures since it started its work in 1981. The Appointing Authority in charge of making the decision on the challenge under Tribunal Rules has never sustained a challenge. However, in two of those challenges, the arbitrators withdrew from the case or were removed by the party itself. [62]

3 Desirability of reform

Reform objectives

68. At the 35th session of the Working Group, it was mentioned that:

- Improvements to enhance the independence and impartiality of the arbitrators should be welcomed as it would be in the interests of both States and investors;
- Improvements to the framework aimed at ensuring the independence and impartiality of arbitrators were constantly being introduced; therefore, when considering possible solutions at a later stage, the benefits and limitations of the existing framework and of the work carried out by other institutions should be taken into account; and

[57] For example, and as discussed in the Background Information on the IBA Guidelines, the English common law position as set out in Porter v Magill [2001] UKHL 67 is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased; in Sweden, whether circumstances that may "diminish confidence in the arbitrator's impartiality" exist; and "evident partiality" in the United States.

[58] Paragraph 1.4 governs situations in which "the arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom".

[59] A Ltd. V. M SDN BHD ([2016] EWHC 422 (Comm)). The Cour de Cassation in France, however, took a different view, holing that the sole arbitrator's failure to disclose his firm's role in a transaction involving the parent company of one of the parties to the arbitration was "such as to reasonably cause a doubt regarding the independence and impartiality of the arbitrator" (Court de Cassation, Civ. 1, 16 December 2015, N D14-26.279).

[60] Available at http://cld.irmct.org/?q=en/cases/ictr-icty-case-law-database.

[61] See cases at http://cld.irmct.org/notions/show/1027/judges#, and a summary of the position in judgment in the case of Rutaganda v. Prosecutor, available at http://unictr.irmct.org/en/cases/ictr-96-3.

[62] See Challenge request from the United States Agent to Appointing Authority Moons, 7 Iran-United States Claims Tribunal at 289-301 (Sept. 17, 1984), and Letter Iranian Agent to Moons, 20 Iran-United States Claims Tribunal at 181 (Sept. 13, 1988).

- The interests of all stakeholders in ISDS should be considered, and any solutions should ensure a balance of interests of stakeholders (A/CN.9/935, para. 62).

69. The Working Group may also wish to consider the desirability of taking into account potential cross-benefits between reforms to enhance the independence and impartiality of arbitrators on other elements of the ISDS regime, including on consistency and coherence in ISDS awards and on costs and duration of ISDS proceedings.

Preliminary views expressed by States

70. At its 35th session, the Working Group heard some preliminary views regarding possible ways to better guarantee the independence and impartiality of arbitrators.

71. Regarding specific approaches, there was broad agreement on the importance of codes of conduct and other ethical requirements for arbitrators. Taking note of a number of existing texts on the conduct of arbitrators (including soft law instruments), the need for efforts at a multilateral level was mentioned. In that context, suggestions were made to the effect that UNCITRAL and ICSID might cooperate in developing such a code. Another suggestion was made that a code of conduct for counsel and experts would be useful (A/CN.9/935, para. 64).

72. Further suggestions included: (i) ensuring that all stakeholders understood the thresholds for when independence and impartiality would be seen to be impaired; (ii) developing requirements for qualifications of arbitrators, their roles and requirements regarding diversity or appropriate regional representation; and (iii) considering different means of appointing arbitrators, including the increased use of appointing authorities or the use of rosters established by States (A/CN.9/935, para. 65).

Questions for consideration

73. In considering the extent to which the existing ISDS regime provides sufficient guarantees of independence and impartiality on the part of arbitrators and decision makers, and any possible reforms it may deem necessary, the Working Group may wish to take into account the characteristics of, and reforms currently underway in, other systems various as discussed above.

74. The Working Group may also wish to note that the additional questions for consideration set out below are also discussed in document A/CN.9/WG.III/WP.149, which provides a general framework for considering the desirability of reforms.

– *Notions of independence and impartiality*

75. The Working Group may wish to note that the notions of independence, and impartiality are elusive, since the terms are employed with several different meanings in legal analyses. At least four senses of independence and impartiality can be identified: they can be referred to at various times as states of mind, institutional conditions, values related to the rule of law or duties (which operate, as the context requires, as either rules or principles). Distinguishing between these meanings may be key in any further work on ethics.[10]

76. The Working Group may wish to consider the impact of the importance of individual (as opposed to institutional) independence in ISDS. The usual safeguards of institutional independence (autonomous budget, internal organization, transparent recruitment processes, objective case assignment, a secure and tenure and fixed terms) do not exist in ISDS. The Working Group may wish to consider whether that characteristic may in part explain the tensions between the appointment mechanisms and the notions of independence and impartiality as they derive from the context of courts and judges.

[10] Issues in contemporary jurisprudence 28 2016, Rule of Law, Independence, *Impartiality and Neutrality in Legal Adjudication*, Diego M. Papayannis

77. In addition, there are relatively few specialists in the field of ISDS compared to the number of specialists in commercial arbitration in general. In a 2017 study, based on 1,039 cases in the databases of Pluricourts and ICSID, the findings are that a small group of 25–30 individuals (one per cent of the lawyers) dominate the system. [54] A person may therefore be called to decide a dispute whose ruling turns out to be relevant in other cases in which this professional acts as a counsel or in close professional relationship with counsel. These particularities of ISDS mean that, in practice, the circumstances of the case must be weighed in order to determine whether an arbitrator who has pre-existing professional relationships with one of the parties is in violation of the duty of independence or impartiality.

78. The Working Group may also wish to consider the impact of the expansion of international arbitration, which has resulted in the diversification of parties involved in the arbitration process. As such, the perspectives of the parties on ethics or conduct of arbitrators may differ significantly and what one expects may sometimes be at odds with the expectations of others from another jurisdiction or with the general practice in international arbitration. The increased complexity of recent disputes involving multiple parties and complicated transactions lead to new and more subtle questions on ethical requirements. Increased regulation of the arbitral procedure and increased transparency of the process also have an impact on parties' expectations in relation to ethics and conduct of arbitrators.

79. In addition, while there seems to be a general agreement about the fundamental ethical standards, in practice however, the assessment of compliance with such standards may be carried out quite differently depending on the texts deemed applicable, and depending also on whether assessment is made by the arbitrators themselves, the parties, the arbitral institutions or national courts. In addition, ethical standards, which by nature evolve with practical reality usually lack explanatory contents about their practical implications. Furthermore, arbitral tribunals can be bound by more than one ethical standard depending on the nationality of the arbitrators, affiliation with bar associations, as well as the place of arbitration. Therefore, multiple norms may apply at the same time, without any clear indication on which shall prevail in case of conflict.

- *Disclosure and challenge*

80. The Working Group may wish to consider whether the procedures for disclosure and challenge are sufficiently certain and predictable to allow arbitrators deciding in practice what should be disclosed and parties in deciding whether to challenge the appointment of an arbitrator or seek annulment of an award or resist enforcement based on an arbitrator's failure to disclose.

81. The Working Group may also wish to take into account that disclosure requirements may require the disclosure of information that would not necessarily constitute a basis for disqualification. The disclosure requirements under the UNCITRAL Rules apply to circumstances that are "likely to give rise to justifiable doubts" about the arbitrator's independence and impartiality, whereas disqualification relies on "circumstances … that give rise to justifiable doubts as to the arbitrator's impartiality or independence". [55] Similarly, the "reliability for independent judgment" under the ICSID Rules on disclosure has been said to be broader than the "manifest lack" of that quality that would lead to disqualification. [56]

82. In addition, the Working Group may wish to consider that while applicable standards require independence and impartiality on the part of arbitrators and other decision makers, they do not provide detailed guidance on the application and interpretation of independence and impartiality in practice. As the discussion of

[54] Network of arbitrators and lawyers in investment treaty arbitration. Langford, Behn, and Lie (2017), see https://www.jus.uio.no/pluricourts/english/news-and-events/news/research-news-double-hatting.html

[55] Articles 11 and 12, UNCITRAL Rules

[56] Rule 6(b), ICSID Rules

published challenge decisions above indicates, the application of the standards in practice may be difficult to predict. Consequently, the Working Group may wish to consider whether those decisions by themselves can provide sufficient guidance on both disclosure and disqualification standards.

83. As noted above, the efficacy of the challenge mechanism relies on parties or their counsel being willing to apply to disqualify an arbitrator and on an effective procedure when they do so. Key elements are that the applications have a predictable outcome, and that they are decided promptly, and without consequences for the challenging party (whatever the outcome may be). Ad hoc examples provide indications that there is a fear of negative consequences for the party applying to disqualify, meaning that some situations in which there may be a lack of independence and impartiality are not addressed. In addition, there is a perception that conflicts of interest are not sufficiently addressed through the mechanism.

84. There is ad hoc commentary to the effect that the number of challenges and the number of tactical, vexatious or frivolous challenges may be increasing in international arbitration generally.[47] In one ISDS case, there were five separate challenges to one arbitrator, stretching from October 2011 to February 2016, all of which were dismissed.[48]

85. The Working Group may also wish to consider the extent to which procedural elements from outside the UNCITRAL and ICSID contexts may provide additional support to the efficacy of the mechanism. In some institutional arbitrations, for example, the arbitral institution hears the challenge, and procedures include rounds of written applications and commentary from opposing parties and the arbitrators.

86. In light of the lack of routine publication of challenge decisions in ISDS, the Working Group may also wish to consider whether there should be increased transparency in those challenges. By way of comparison, the LCIA publishes online decisions on challenges to arbitrators in international commercial arbitration, together with a digest of decisions.[49]

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[47] See, for example, LCIA Reference No. 100011 (3 August 2005).

[48] ConocoPhillips Company and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30.

[49] Available at http://www.lcia.org/challenge-decision-database.aspx. The cases include those under the LCIA Rules, and arbitrations under the UNCITRAL Rules where the LCIA was the appointing party.